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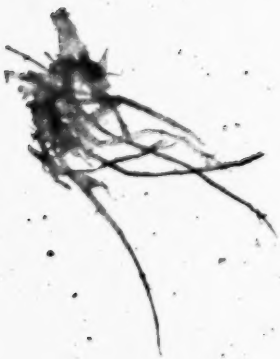

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 479

WONG SUN AND JAMES WAH TOY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 135–145) is reported at 288 F. 2d 366.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1961 (R. 146). A petition for rehearing was denied on April 12, 1961 (R. 146). The petition for a writ of certiorari was filed on May 5, 1961, and was granted on October 9, 1961 (R. 147). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the arrests of petitioners were based on probable cause and therefore lawful.

2. Whether petitioners' confessions, and the narcotics obtained as the result of one petitioner's statement, were admissible even if petitioners' arrests were invalid.

3. Whether petitioners' confessions were sufficiently corroborated.

STATUTE INVOLVED

Section 7607 of Title 26 U.S.C. provides:

> The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401(l) of the Tariff Act of 1930, as amended; 19 U.S.C., Sec. 1401(l)), may—
>
> (1) carry firearms, execute and serve search warrants and arrest warrants, and serve subpoenas and summonses issued under the authority of the United States, and
>
> (2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committeed or is committing such violation.

STATEMENT

Petitioners were convicted in the United States District Court for the Northern District of California (a jury having been waived) of concealment and transportation of illegally imported heroin, in violation of 21 U.S.C. 174 (R. 4–5, 124, 126). Petitioner James Wah Toy was sentenced to imprisonment for five years (R. 126), and petitioner Wong Sun, as a second offender, to imprisonment for 10 years (R. 121, 124).

The issues in this Court relate primarily to the trial court's refusal to exclude evidence as to statements made by petitioner Toy at the time of, and after, his arrest, narcotics found by the federal agents at the home of a third party (Johnny Yee) after they had arrested Toy, and formal confessions made by petitioners Toy and Wong Sun some days later, after they had been arraigned. Petitioners objected at the trial to the admission of this evidence (R. 31 *ff.*, 48–50, 57–62, 64, 69, 72–73, 74, 77, 91, 100 *ff.*).

I. THE EVIDENCE

A. THE ARREST OF PETITIONER TOY

Between 5:30 and 6:00 o'clock on the morning of June 4, 1959, one Hom Way told federal narcotics agent William Wong that he had purchased an ounce of heroin the night before from a person known as "Blackie Toy" who operated a laundry on Leavenworth Street in San Francisco (R. 54–55). Hom Way had been arrested at about 2:00 o'clock that morning (June 4), in possession of narcotics (R.

55–56). The agent had known Hom Way about six weeks. When questioned at the trial as to whether Hom Way was a reliable informer, the agent replied, "I believe so, yes sir" (R. 54), and repeated, on cross-examination, "I believe he would be reliable" (R. 55). The agent did not have knowledge as to whether Hom Way had been arrested or convicted for any previous narcotics violations (R. 56). This was the first information the agent had received from Hom Way (R. 56).

At about 6:30 a.m. on June 4, federal agent Alton Wong went to the door of petitioner's Toy's laundry on Leavenworth Street (R. 33, 51). In June at this time of morning it was no longer dark (R. 34; and see R. 58). The federal agent went to the door alone, rang the bell, and knocked (R. 34, 36, 51). When petitioner Toy opened the door, the agent said he wanted some laundry. Toy replied that he did not open until 8, and to return then (R. 51). The agent then exhibited his official badge and informed Toy, "I am a federal narcotics agent" (R. 51–52). Toy slammed the door and the agent, seeing through the glass of the door that Toy was running toward the rear of the premises, forced the door open, and pursued Toy (R. 52).[1] The officer, running after Toy, repeated, "I am a narcotics treasury agent," but Toy ran on into the living quarters to the rear (R. 52–53). Toy ran over the top of the bed where his wife and child were sleeping, in order to reach a nightstand

[1] Toy, testifying on *voir dire*, denied that the agent had identified himself before Toy began to run, and alleged, "I wasn't running, I was just taking big steps" (R. 39).

drawer, "and reached in for something in there" (R. 52). The agent, following Toy over the bed, seized him, drew his gun and told Toy he was under arrest. The nightstand drawer was empty. Toy was handcuffed and the agent then searched the premises (R. 52, 66). Nothing was found at the time (R. 52, 65–66).

B. THE SURRENDER OF THE NARCOTICS BY JOHNNY YEE

One of the agents informed Toy of Hom Way's statement that Toy had sold him narcotics. Toy denied that he had sold narcotics but added that he knew someone who had—one "Johnny"—at whose house he had been the night before (R. 63). Toy gave full details as to the appearance of the house, the location of "Johnny's" bedroom there, the amount of heroin in his possession, and the usual practice of "Johnny's" mother to come out of the house at about 8 a.m. with the children going to school. The agents immediately left for the house, arriving there at about 8 a.m. on June 4, at which time a youngster and a man and a woman came out. One of the agents showed his badge to the woman and asked whether Johnny was at home. She replied, "Yes, he is upstairs." In the bedroom, Yee surrendered about an ounce of heroin, without a search (R. 19, 63–64, 66). He was arrested (R. 20).

C. THE ARREST OF PETITIONER WONG SUN

At the office of the Bureau of Narcotics—"within an hour or so" on June 4 (R. 90, 94)—Yee informed the agents that the heroin had been brought to his house by petitioner Toy and a person known to him

only as "Sea Dog" (R. 90, 94). Petitioner Toy informed the agents, at about 10:30 a.m., that the person known to Yee as "Sea Dog" was petitioner Wong Sun. Toy went with the agents to identify Wong Sun's residence (R. 90, 95).

At Wong Sun's residence, at a little after 11 a.m. on June 4, agent Alton Wong rang the door bell. When a lady opened the door, he entered and asked for Mr. Wong. At this time Betty Wong appeared. Agent Wong identified himself as from the Federal Bureau of Narcotics. Agent Casey, who followed him in, addressed Mrs. Wong as "Betty" and asked her where Wong Sun was. She informed him that he was in the back room sleeping. Agent Casey then arrested Wong Sun, and the premises were searched (R. 96–99).[2]

D. THE SUBSEQUENT CONFESSIONS BY PETITIONERS

Although the record does not contain the information, the fact is that petitioner Toy was arraigned before the Commissioner on June 4 and petitioner Wong Sun on June 5. Each was released on his own recognizance. On June 9, each of the petitioners was interviewed separately by an agent at the Bureau offices.[3] Each was told of his right not to answer

[2] Wong Sun and his sister-in-law testified on *voir dire* that the arrest was made after an entry by asking for another person and while Wong Sun and his wife were in bed asleep (R. 81–89). Wong Sun stipulated that he had previously been convicted of a narcotics felony (R. 89).

[3] The agent testified, as to Toy, that he "spoke with" Toy, also, on the 5th of June, "I believe" (R. 67). The statement of Toy bears, in the heading, the notation that it was "taken on June 5, 1959."

questions or make a statement, of his right to counsel, and of the fact that any statement made could be used against him. Each was told that the agent could make no promises of immunity or leniency. Thereafter each discussed details of narcotics transactions, first by answering questions, then by repeating details to the agent who took down the answers in rough form and subsequently prepared a typewritten statement. Each statement was shown to the respective petitioner, read to him in English, and interpreted in Chinese. Each petitioner acknowledged his statement to be correct but refused to sign it, because of the absence of assurance that the other had also signed (R. 66–72). The statements were admitted into evidence over objection (R. 106).

1. *Wong Sun's confession* (*Exhibit 4*).

Wong Sun's confession included the following statements: He met Toy at Marysville, California, about the middle of March 1959, during a Chinese celebration. They returned to San Francisco together and discussed the possible sale of heroin. Wong Sun informed Toy that he could get a "piece" from one "Bill" for $450.[3a]

Shortly thereafter, Toy told Wong Sun he wanted a "piece" for "Johnny." Wong Sun knew Johnny only through Toy. Wong Sun obtained the heroin, and did so again on about 7 or 8 additional occasions, on one of which the heroin was for someone other than Johnny.

On several occasions after obtaining the first "piece," Wong Sun drove with Toy to Johnny's house, 606–11th Avenue, and Toy would deliver the

[3a] A "piece" is 28 grams (one ounce) (R. 19, 63–64).

heroin to Johnny and the three would smoke some of it. Johnny paid Toy $600 for each "piece." On three other occasions Wong Sun and Toy went to Johnny's without bringing heroin, and smoked heroin there and obtained some for themselves.

About four days before the arrest [the arrest was on June 4],[4] Toy gave Wong Sun $450 and, after the latter obtained the heroin, Toy phoned Johnny, and Toy and Wong Sun drove to Johnny's house at about midnight. Toy gave the heroin to Johnny in a rubber contraceptive enclosed in a small brown bag.

On the night before the arrest, before 11 p.m., Toy phoned Johnny, and the two went to Johnny's to smoke heroin for half an hour. They also obtained one "paper" of heroin for their own use later.

2. *Toy's confession* (*Exhibit 3*).

Toy's confession included the following statements: He first met Wong Sun, known to him as "Sea Dog," about three months before June 5, 1959, at Marysville, California, during a Chinese holiday. Toy drove him back to San Francisco.

Sometime during April or May of 1959, Wong Sun asked Toy to drive him to the home of Johnny Yee, at 11th and Balboa Streets, first asking Toy to phone Johnny that they were coming. Wong Sun there delivered to Johnny a paper package of heroin and, upon Toy's request, gave him some which he

[4] This would place the date on May 31 and the post-midnight events on June 1.

smoked. Wong Sun paid Toy $15 for driving him to Johnny's.

Toy drove Wong Sun to Johnny's "about 5 times altogether," each time receiving $10 or $15 and Toy was also given enough heroin for 3 or 4 cigarettes. The last occasion for driving Wong Sun was "last Tuesday, May 26."[5] Thereafter, on Wednesday night, June 3, at about 10 p.m., Toy phoned Johnny that he didn't "have anything" and was coming out "pretty soon." When he arrived, Johnny gave him—"just out of friendship"—a paper of heroin sufficient for 5 or 6 cigarettes, without any money given or asked. "He has given me heroin like this quite a few times. I don't remember how many times."

Toy had "known Hom Wei [the original informer, *supra*, pp. 3–4] about 2 or 3 years but I have never dealt in narcotics with him. * * * The only connection I now have is Johnny Yee."

E. THE TESTIMONY OF JOHNNY YEE

Johnny Yee, called as a government witness, proved recalcitrant. He admitted, however, that he knew both Wong Sun and Toy, and identified both in the courtroom (R. 20). He stated that he had known Toy since 1951 or 1952 and had known Wong Sun that year, 1959 (R. 20). He confirmed Wong Sun's nickname of "Sea Dog" (R. 20). He stated that, a month before his arrest, Toy, with wife and

[5] "Last Tuesday," whether viewed from June 5 (a Friday) or June 9 (a Tuesday), would have been June 2, not May 26, which was two Tuesdays before.

children, had visited his home (R. 20–22). He admitted that he had made a sworn statement to the officers that on Monday, June 1, prior to midnight, Wong Sun and Toy had come to his house, and that on Wednesday evening, June 3, Toy had phoned before 11 p.m. that he would be by, and that he and Wong Sun had come up between 11:00 p.m. and midnight (R. 30). He stated, however, that he had lied in making the latter statements (R. 30). The government thereupon dismissed the witness.

II. THE OPINION OF THE COURT OF APPEALS

The court of appeals, one judge dissenting, affirmed the convictions. The court concluded that the arrest of each petitioner had been based on information not known to be reliable, and hence was without probable cause, but held that the illegality of the arrests did not render inadmissible the voluntary confessions, or preclude the agents from using information obtained from the pre-confession statements as leads for tracking down the criminals (R. 135–145).

SUMMARY OF ARGUMENT

The court of appeals considered petitioners' arrests to have been based on insufficient probable cause but held, in effect, that there was nothing in the arrest of petitioner Toy which required him to accuse Johnny Yee and to send the narcotics agents to Yee's house, and hence that the surrender of the narcotics by Yee could not be deemed the fruit of the arrest of Toy. Similarly, the unanticipated statements by Yee, which

led on from him to petitioner Wong Sun and unexpectedly circled back to involve Toy as well, were not the fruit of the arrest of Toy. And the later confessions of Toy and Wong Sun, yet another stage removed, were likewise considered by the court of appeals not to be fruits of the arrests of either Toy or Wong Sun.

The government agrees with the court of appeals that the evidence introduced at the trial was not the product of the arrests. However, it is the government's initial position that that issue need not be reached because the judgments below may be sustained upon the ground that the arrests were lawful emergency arrests based upon probable cause.

I

Petitioners were lawfully arrested on probable cause.

A. In ruling that there was a lack of probable cause, the court of appeals unduly emphasized what is only one element in the determination of reliability—the receipt of prior information from an informant. Information may be given under such circumstances that it has the badge of reliability even if the informant has not previously had occasion to furnish information to the officers. The question is always whether, under the particular circumstances presented by the record, the officers acted reasonably. There is no mechanical rule forbidding reliance on information from an informant who has not previously been tested.

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B. At least two elements were operative in the arrest of Toy, and the government need not and does not attempt to rely on either element alone to show that the officers acted reasonably.

1. The first factor was the statement of Hom Way to the agents that he had obtained an ounce of heroin the night before from Toy. The agent had known Hom Way for six weeks and therefore had a basis for judging whether, under arrest, he would be likely to tell the truth or attempt to throw the agents off the scent. An investigator must have leeway to make an informed judgment as to the character of the persons with whom he must deal. Hom Way's designation of petitioner was not vitiated by the fact that Hom Way was himself under arrest; indeed, his statements, which were quite detailed, could be viewed with more confidence since he must have known that he could and would be confronted with any inconsistencies that might develop.

2. The second element is what occurred at Toy's place. The officers did not go to the door in a group, as would have been the case had an arrest been intended on the basis of Hom Way's statement alone; one officer went to investigate further by interviewing Toy, while the others remained nearby. The hour was early, 6:30 a.m., but it was daylight, not darkness. Moreover, the officers were on the trail of heroin, which is easily concealed or destroyed; word of Hom Way's arrest or even of his disappearance from his ordinary haunts could travel quickly.

The officer knocked, and when Toy opened the door, the agent began by asking for laundry. When Toy

told the agent to return for his laundry later, the latter merely showed his badge and stated, "I am a federal narcotics agent." He said nothing about an arrest. There then occurred the action by Toy that forced upon the officer a split-second decision and demonstrated to him that immediate arrest was necessary. Toy slammed the door shut and fled toward the rear of the laundry. If he had narcotics on the premises he could conceal or destroy them in an instant. The door was not slammed when the man at the door inquired for laundry; it was slammed when the officer's badge was exhibited. The officer then had cause to believe Toy guilty, for an unexplained flight from an officer is strong indication of guilt.

3. Petitioners contend that the absence of affirmative evidence that the officer stated his purpose to arrest Toy brings the case within the prohibition of *Miller* v. *United States*, 357 U.S. 301. The language of *Miller* itself answers this contention. This Court there noted decisions (p. 309) "holding that justification for noncompliance [with the requirement of statement of purpose] exists in exigent circumstances, as, for example, when the officers may in good faith believe * * * that the person to be arrested is fleeing or attempting to destroy evidence. *People* v. *Maddox*, 46 Cal. 2d 301, 294 P. 2d 6."

C. In the case of the arrest of Wong Sun, probable cause for arrest was provided by the combined, consistent statements of Yee and petitioner Toy. Yee's accusation of "Sea Dog" (Wong Sun) as the supplier (with Toy) of his narcotics was significantly corroborated before the officers went to arrest Wong

Sun. Yee's statement that he had been furnished heroin was substantiated by his actual possession of the drug. His surrender of the narcotics to the officers, without a search, was not attended by any unlawful conduct by the officers. His statement that Toy had been one of the two who furnished the heroin was substantiated by Toy's detailed knowledge of Yee's possession of the narcotics, as revealed in Toy's earlier statement to the officers. Yee's tie-in of "Sea Dog" with Toy dove-tailed immediately thereafter with Toy's knowledge of the real name of "Sea Dog" Wong Sun and Toy's knowledge of where Wong Sun lived.

II

On the assumption that the arrests were illegal, petitioners contend that all the evidence obtained after those arrests must be deemed the "fruits of the poisonous tree" and therefore inadmissible. While it is the rule that, if the evidence sought to be introduced is the true product of illegal government action it is excludable, it is not the rule that the mere fact that there has been illegal government action at some prior point is sufficient. If the evidence is attributable to an intervening act of free will on the part of the defendant and not to the illegal government action, the evidence is admissible. Whether evidence can be said to be the result of the illegal action or of an independent act of free will requires a judgment based on the precise facts of a given case. In particular, the question of whether a statement made at the time of illegal entry should be deemed admissible

cannot be settled by any fixed rule but must essentially represent a judgment, based on all the circumstances, as to whether the illegal government action or the voluntary act of the defendant is the primary motivating force behind the evidence. In the present case, petitioners' statements to the officers were not the products of illegal arrests or entries, but of their own voluntary, deliberate decision to speak.*

Nueslein v. *District of Columbia*, 115 F. 2d 690 (C.A.D.C.), held that, even though nothing was found after an illegal entry, certain statements made during the illegal entry were the result of the illegality and therefore inadmissible. Officers investigating only a misdemeanor, an accident in which a taxicab had struck a parked car, went to the home of the taxicab owner and entered the home without a warrant and without permission of the owner. The owner admitted that he had been driving the taxi and, since he appeared to the officers to be drunk, the officers placed him under arrest. The decision of the District of Columbia Circuit, in relating the admissions to the illegal entry when the illegal entry in no sense compelled the owner to talk, admittedly goes far, but it does not go as far as would be necessary to go in the instant case of investigation of a narcotics felony. In *Nueslein* the admissions made by the taxicab owner were admissions of guilt as to the very act which prompted the officers to make the illegal entry, and those admis-

* The full and formal confessions by petitioners, which were wholly voluntary, were clearly admissible under the settled rule that a subsequent voluntary confession is not rendered excludable by a prior illegal arrest.

sions were made by an intoxicated man. Here, petitioner Toy, although knowing that the officers had found nothing of what they sought, deliberately and voluntarily sent them to Johnny Yee in order to divert suspicion from himself. It was Hom Way's accusation of Toy which caused Toy to send the officers to Yee's house, and Hom Way's accusation in no way stemmed from the illegal entry. Toy merely saw an opportunity to sidetrack the officers from Hom Way's accusation, and consciously made use of that opportunity. In short, he would now have the Court bar evidence that he himself deliberately uncovered.

III

Petitioners' confessions were corroborated by substantial additional evidence, and the confessions disclosed such possession of narcotics as served to raise the statutory presumption of guilty knowledge.

A. Corroboration of a confession requires only evidence that will tend to establish its trustworthiness, and does not demand evidence sufficient to establish the corpus delicti independently. The special problem with respect to reliance on a confession arises out of concern whether a particular confession may be the product of "the aberration or weakness of the accused under the strain of suspicion" (*Opper* v. *United States*, 348 U.S. 84, 90). But if facts are shown, by evidence other than the confession, demonstrating that the confession is not a fantasy warped by the aberration or weakness of the accused, then the finder of fact may properly attribute the confession to the familiar motivation of an accused per-

son who realizes that he has been caught and may as well tell the truth.

B. In the case of Wong Sun's confession, the trial judge could properly conclude that his chronicle, from the time of his first acquaintance with Toy, in March 1959, through his series of visits with Toy at Yee's house, terminating in the visits on or about June 1 and 3, was sufficiently corroborated to be accepted. The critical portion of the confession, *i.e.*, Wong Sun's statement that he transported an ounce of heroin from his source of supply to Toy on the night of May 31, 1959, and that he and Toy then transported the heroin to Yee at Yee's house at about midnight, is firmly supported by the actual possession of 27 grams of the heroin by Yee at Yee's house on the morning of June 4. The absence of a part of the ounce, and the division of the heroin into several containers after being brought to Yee's house in one container, substantiate the further portion of Wong Sun's confession that he and Toy had gone to Yee's house again on the night of June 3, smoked heroin, and taken one "paper" for their later use. In addition, there was corroboration of parts of the confession in Agent Nickoloff's testimony that Toy had admitted to him on June 4 that he had been at Yee's house the night before, as well as in the separate testimony of Yee showing that he knew Wong Sun.

C. Toy's confession, unlike that of Wong Sun, shows an effort on his part to withhold some of the facts. Like the accused in *Opper* v. *United States, supra,* 348 U.S. 84, he obviously sought to admit only what he thought could be proved against him by other

evidence. But what Toy stated in his confession was sufficiently corroborated to warrant consideration of his statement. When he confessed to delivery of heroin at Yee's house, he was not spinning a fantasy—the 27 grams of heroin at Yee's house on the morning of June 4 corroborated this admission. Additionally, Toy admitted a series of visits to Yee's house. This was corroborated in Toy's very detailed familiarity with the house, as disclosed in the testimony of Agent Nickoloff. The statement in Toy's confession specifically placing him at Yee's house on the night of June 3 was further substantiated in Agent Nickoloff's testimony that Toy admitted to him on June 4 that he had been at Yee's house the night before. There were also other elements of corroboration.

ARGUMENT

Petitioners argue that the trial court erred in admitting several items of evidence—petitioner Toy's statements to the federal agent (at the time of and after his arrest) which led the agents to Johnny Yee and to petitioner Wong Sun, the narcotics found at Yee's house, and the formal confessions made by petitioners some days later, subsequent to their arraignment—because all of this evidence resulted from the petitioners' arrests which are claimed to have been unlawful. Although holding that the arrests of both petitioners were invalid as not based on probable cause, the court of appeals sustained the convictions on the ground that the invalidity of the arrests did not void the confessions by petitioners nor the statement by petitioner Toy which led the agents to recover narcotics from Yee. In effect, the court

held that there was nothing in the fact of petitioner Toy's arrest which required him to send the agents to Yee and hence that the finding of narcotics at Yee's house could not be deemed the fruits of the illegal arrest. Similarly, this new information, which led to proof against petitioner Wong Sun and circled back to Toy as well, was held not to be the fruit of the arrest of Toy.

The government agrees with the court of appeals that the evidence introduced at the trial was detached from and not the product of the arrests. However, as pointed out in the government's brief in opposition, it is our initial position that that issue need not be reached because we believe that the judgments below may be sustained upon the ground that the arrests were lawful emergency arrests based upon probable cause. We discuss first our reasons for believing that the arrests were lawful, before turning to the grounds relied upon by the court of appeals.

I

PETITIONERS WERE LAWFULLY ARRESTED UPON PROBABLE CAUSE

It is the position of the government that, in the circumstances of this case, the petitioners were lawfully arrested. In the case of Toy, reasonable grounds for an immediate arrest without warrant arose from the combined impact of two elements: first, the specific designation of Toy as a source of supply of narcotics by a man deemed reliable by a federal narcotics agent, and, second, the flight by Toy when confronted

with a narcotics agent's badge and identification. The narcotics agent did not arrest Toy upon the word of the informer (Hom Way) alone. He first went to Toy's door for further investigation and sought to engage Toy in conversation under guise of seeking laundry and, then, by making known his identity as a federal narcotics agent. At this point Toy took flight, and the agent pursued and arrested him.

In the arrest of Wong Sun, the identification was the product of the combined information from both Yee and Toy; the former was the authentic possessor of the heroin and the latter the supplier of exact and correct information as to the location of the heroin and of Wong Sun.

A. UNDER COMMON LAW AND 26 U.S.C. 7607, ARRESTS MAY BE MADE WITHOUT WARRANT UPON PROBABLE CAUSE OR UPON "REASONABLE GROUNDS TO BELIEVE THAT THE PERSON TO BE ARRESTED HAS COMMITTED" A NARCOTICS FELONY

Probable cause for arrest under the Fourth Amendment and the specific statutory "reasonable grounds" upon which federal narcotic agents may arrest without a warrant "are substantial equivalents of the same meaning". *Draper* v. *United States*, 358 U.S. 307, 310. The broad requirements of probable cause, to be applied to the specific facts of cases as they arise, have been stated by this Court as follows:

> In dealing with probable cause, * * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is ac-

cordingly correlative to what must be proved.

"The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt." *McCarthy* v. *De Armit,* 90 Pa. St. 63, 69, quoted with approval in the *Carroll* opinion. 267 U.S. at 161. And this "means less than evidence which would justify condemnation" or conviction, as Marshall, C.J., said for the Court more than a century ago in *Locke* v. *United States,* 7 Cranch 339, 348. Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where "the facts and circumstance within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. *Carroll* v. *United States,* 267 U.S. 132, 162.

These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. * * * [*Brinegar* v. *United States,* 338 U.S. 160, 175–176].

To this may be added the further illumination of observations in the courts of appeals. In *Christensen* v. *United States*, 259 F. 2d 192, 193, the Court of Appeals for the District of Columbia Circuit said:

> Taking into account the detailed description of appellant secured through the advance "tip" along with the detective's observations of appellant's appearance and conduct * * * we hold that there was probable cause for the officer to make the arrest. We cannot view the advance "tip" information and the observations of the police detective in two separate logic-tight compartments. Neither one standing alone would constitute probable cause, but together they composed a picture meaningful to a trained, experienced observer.

And in *Bell* v. *United States*, 254 F. 2d 82, 85 (C.A. D.C.), Judge Prettyman noted that suspicion *on reasonable grounds* is not the "mere suspicion" denounced in *Mallory* v. *United States*, 354 U.S. 449, 454, and stated (254 F. 2d at 85–86):

> [Officers] do not schedule their steps in the calm of an office. Things just happen. They are required as a matter of duty to act as reasonably prudent men would act under the circumstances as those circumstances happen. * * *
>
> * * * * *
>
> [The] action [of an officer experienced in the narcotics traffic] is not measured by what might be probable cause to an untrained civilian passerby. When a peace officer makes the arrest, the standard means a reasonable, cautious and prudent peace officer. The question

is what constituted probable cause in the eyes of a reasonable, cautious and prudent peace officer under the circumstances of the moment.

B. THE COMBINATION OF THE NAMING OF PETITIONER TOY BY INFORMER HOM WAY AS HIS SOURCE OF SUPPLY OF NARCOTICS, AND THE ATTEMPTED FLIGHT OF TOY WHEN THE FEDERAL AGENT IDENTIFIED HIMSELF AS A FEDERAL NARCOTICS AGENT, GAVE THE AGENT PROBABLE CAUSE JUSTIFYING THE IMMEDIATE ARREST OF TOY

At least two elements were operative in the arrest of petitioner Toy, and we need not and do not attempt to separate them or to rely upon either element alone. The combination of both, we believe, adds up to probable cause for the arrest of Toy.

1. *Hom Way's statement that he had obtained narcotics from Toy was entitled to great weight.*

The first element, in point of time, in the composite of elements that led to Toy's arrest was the statement of informer Hom Way that he had obtained an ounce of heroin, the night before, from Toy. In appraising the weight of that one statement, one cannot determine its reliability solely upon the basis of whether Hom Way had or had not previously furnished information to the agents. We think that, in stressing this factor, the court of appeals unduly emphasized what is only one element in the determination of an informer's reliability—the receipt of prior information from him. The element of past receipt of information would clearly be a favorable factor, but it is not indispensable. When this Court, in *Draper* v. *United States*, 358 U.S. 307, referred to the fact that there the government agent had received information from the special employee in the past, it was not ruling that

this was indispensable, or that an agent cannot have other reasons for believing an informant. An adequate judgment of reliability depends on a number of circumstances. If relatives of an accused give information as in *United States* v. *Naples,* 192 F. Supp. 23 (D. D.C.), pending on appeal, C.A. D.C., No. 16436,[7] officers have a right to take the information very seriously, even if they have never received information from such persons before.[8] Very little corroborating information would be needed to justify an officer in reaching the conclusion that the information given was reliable. On the other hand, more corroboration may reasonably be deemed necessary if information came from an anonymous tip or from a source, theretofore unknown, as to which the officers had no

[7] *Naples*, a homicide case, involved information given by the defendant's brother.

[8] *People* v. *Witt*, 159 Cal. App. 2d 492, cited by petitioners (Pet. Br. 9), while stating, without citing authority, that one Cibrian could not be considered to be a "reliable informant" because he had not theretofore given the police information, reversed this conclusion in the actual holding of the case. Cibrian's statement that a certain car contained "hot stuff" and guns was deemed sufficient to justify the action of the officers in approaching the car with drawn guns, ordering defendant and another man out of the car, and searching the car for weapons. This search disclosed the stolen articles and guns upon which the defendant was later convicted of burglary. The court assumed that the arrest was made only after the findings in the car, but the court obviously thought the information given by Cibrian justified further investigation.

opportunity for judgment." The question is always whether under the particular circumstances the agents acted reasonably.

In this case, agent Wong was dealing with a person (Hom Way) whose character he had had an opportunity to appraise. The court of appeals observed that there was "no showing in this case that the agent knew Hom Way to be reliable" (R. 139–140). However, the federal officer testified that he had known Hom Way for six weeks and judged him to be reliable. It was not incumbent on the prosecution to develop in the first instance all the detailed mental pro-

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[9] Anonymous or virtually unknown informers were involved in many of the cases where reliance on an informant was held not to constitute probable cause. *Worthington* v. *United States*, 166 F. 2d 557 (C.A. 6), involved an unknown voice on the telephone, and *Contee* v. *United States*, 215 F. 2d 324 (C.A.D.C.), cited by petitioners (Pet. Br. 8), a tip from a man whose name was unknown. Similarly, in *Wrightson* v. *United States*, 222 F. 2d 556 (C.A.D.C.), cited by petitioners (Pet. Br. 8), the record disclosed no identified informer but only an "anonymous" tip (*Id.*, 557); when further information was developed on retrial, the court found that there was probable cause for the arrest. 236 F. 2d 672, 673 (C.A.D.C.). See also *People* v. *Goodoo*, 147 Cal. App. 2d 7; *People* v. *Thymiakas*, 140 Cal. App. 2d 940, 941. In *People* v. *Walker*, 165 Cal App. 2d 462, 465, cited by petitioners (Pet. Br. 8), the court referred to the asserted absence of any previous use of the particular informants as such, "or other evidence" to establish their reliability, but then found the "other evidence" of reliability in the corroboration of the informants' correct statement of the name assumed by defendant and of defendant's then whereabouts at a hotel (*Id.*, 465); the combination of this with observations by the officers was held to sustain the arrest.

cesses that went into that judgment. The officer was experienced and could draw upon his investigative training and experience in making his appraisal. If petitioner wished to attack the basis of the officer's judgment, it was open to him to seek further details on cross-examination or to offer countervailing evidence. Petitioners cannot rely upon mere conjecture by counsel (R. 60) that the federal agent could have known Hom Way only by limited investigation or that such investigation could not have disclosed probable cause for reliance on him.

Furthermore, the evidence did show circumstances pointing to the reliability of the information beyond the officer's personal appraisal of Hom Way. The latter, while under arrest, gave specific information that he had obtained an ounce (a substantial amount) of heroin the night before from a particular person who operated a laundry on a named street in San Francisco. The very fact that Hom Way was this specific in his statement, while under arrest, tended to give credence to his information, for the information was in sufficient detail to be checked and Hom Way could and would be confronted with any discrepancies if the information proved to be incorrect—as he doubtless knew.

The specificity of information given by an informant is a factor which the courts have considered in determining whether an officer can reasonably rely upon it. See *Jackson* v. *United States*, C.A. D.C., No. 16631, decided February 8, 1962. In *Draper* v. *United States*, 358 U.S. 307, one of the elements which entered into the evaluation of probable cause was the

fact that the informant had given specific information of the defendant's appearance and manner which observations by the officers could corroborate.[10] The courts have held that information given by persons under arrest or by their friends is entitled to credence so that when it is corroborated only slightly the total circumstances can and do amount to probable cause for an arrest. See *Thomas* v. *United States*, 281 F. 2d 132 (C.A. 8), certiorari denied, 364 U.S. 904, where the court found probable cause for an arrest in statements by relatives of thieves that stolen property had been sold to the defendant. Indeed, the court below in *Rodgers* v. *United States*, 267 F. 2d 79 (C.A. 9),[11]

[10] On the other hand, in some of the cases, information given by informers was held insufficient because it was stale or because it was not specific. *E.g.*, In *Cervantes* v. *United States*, 263 F. 2d 800, 804–805 (C.A. 9), cited by petitioners (Pet. Br. 9), the court did not reach the question whether a sufficient showing was made as to the "trustworthiness" of the informant—since the informant's information related to incidents 6 to 10 weeks before the arrest. In *People* v. *Dawson*, 150 Cal. App. 2d 119, cited by petitioners (Pet. Br. 9), the objection to the information was not to the absence of past experience with the informer (he had three times provided valid information), but with the lack of specificity—such information would cause arrest of "any Negro anywhere in San Francisco driving a [1953 Oldsmobile '98' convertible with a black top and light body]" (*Id.*, 123, 129). The court *sustained* the arrest, however, upon the additional element of flight.

[11] This decision was cited in the opinion below for the requirement that the person furnishing information be "reliable", but nothing in *Rodgers* bases "reliability" exclusively upon past furnishing of information. To the contrary, in *Rodgers* the addict who accused the defendant had theretofore had no contact with the agents (*id.*, 83).

found that information given by a person under arrest constituted probable cause when viewed in relation to the fact that the defendant was found at the place where the informer had said she would be and where her husband had denied that she was. See also *People* v. *Howard*, 173 Cal. App. 2d 787, where information given by a group passing forged checks was held to be sufficiently corroborated by the defendant's attempted flight in slamming a door in an officer's face.

Whether or not it would itself constitute probable cause for an arrest, the information given by Hom Way to the agent was entitled to be given considerable weight. It had sufficient earmarks of credibility to justify, indeed to require, investigation. The agents would have been derelict in their duty had they failed to pursue the matter further. And when, in the course of their inquiry, other events (discussed below, pp. 28–33) occurred which gave support to Hom Way's information, the agents had probable cause to arrest petitioner Toy.

2. *The actions of Toy, when he learned that the man at his door was a federal narcotics agent, were sufficient corroboration of the prior information to constitute probable cause for Toy's arrest.*

The officers did not proceed to arrest Toy simply upon the basis of Hom Way's designation of Toy as the supplier of narcotics. Rather, the agents proceeded immediately to investigate by interviewing Toy. They did not go to the door in a group, as would have been the case had an arrest been intended. One of the officers remained as far away as half a block

(R. 35). The other officers were available if an arrest should become necessary or if a search were voluntarily permitted by Toy, but only one officer went to the door.

The hour was early, 6:30 a.m., but it was daylight, not darkness. The fact that it was no longer dark at this time of year is of more significance than the exact hour. For example, while a search warrant must be served in "the daytime" if the affidavits are not positive as to the location of the property (Rule 41(c), F.R. Crim. P.), the test is not the time of rising or setting of the sun but whether there is light; dawn or twilight suffices. *Moore* v. *United States*, 57 F. 2d 840, 843 (C.A. 5); *United States* v. *Liebrick*, 55 F. 2d 341, 343 (M.D. Pa.); *Albright* v. *Baltimore & O.R. Co.*, 22 F. 2d 832 (E.D. N.Y.). Nor is 6:30 a.m. so unreasonably early as to be compared to pulling a man out in the small hours after midnight. This was a laundry which was due to open at 8, or possibly 8:30, o'clock (see R. 51, cf. R. 38), and a community in which many businesses open at 8 o'clock. In judging the reasonableness of the officer's action it is also necessary to bear in mind that, in dealing with as easily concealable and as valuable a contraband as heroin, delay in the investigation could have serious consequences. Word of Hom Way's arrest or even of his disappearance from his ordinary haunts could travel quickly and lead to the hiding or destruction of the narcotics.

The officer knocked, and when Toy opened the door he began by asking for laundry. Had the officer contemplated immediate arrest, he would have indulged

in no such conversation; with the door open, he could have seized Toy. Instead, when Toy terminated the opportunity for further conversation by telling the agent to return for his laundry later, the agent merely disclosed his official capacity, obviously to continue the interview. He showed his badge and stated, "I am a federal narcotics agent." He said nothing about an arrest. This is undisputed in the officer's testimony and that of Toy himself (R. 51–53; 38, 39, 45–47). Contrary statements in the arguments of counsel in the district court are not supported by the record.

There then occurred the action by Toy that forced upon the officer a split-second decision and supported the arrest as immediately necessary and lawful. Toy slammed the door shut and fled toward the rear of the laundry (the officer could see the flight through the glass in the door). If Toy had narcotics on the premises he could conceal or destroy them in an instant. See *Mattus* v. *United States,* 11 F. 2d 503, 504 (C.A. 9); *United States* v. *Kanceo,* 252 F. 2d 220, 222 (C.A. 2). He could also escape. In sum, Toy's action in fleeing, combined with Hom Way's accusation, constituted probable cause for the arrest of Toy at that moment. Toy's slamming of the door was no flight from a supposed robber. Toy made no claim of any such fear.[12] The admitted circumstances af-

[12] He testified, instead, that he had closed the door and gone to the rear of the laundry, admittedly taking "big steps" (*supra*, p. 4), and that the officers had thereafter suddenly crashed through the door. We disagree with petitioners' statement (Pet. Br. 4) that "Toy testified he then" locked the

ford no explanation of the flight to the rear other than guilt. There was only a single agent, standing in daylight at the door of a laundry on a public street, with no weapons, and who had made no attempt to enter. The door was not slammed when the man at the door inquired for laundry; it was slammed when the officer's badge was exhibited.

In these circumstances, the officer surely had cause to believe Toy guilty; unexplained flight from an officer is strong indication of guilt. *Husty* v. *United States,* 282 U.S. 694, 701; *Brinegar* v. *United States,* 338 U.S. 160, 166, fn. 7; *Wrightson* v. *United States,* 236 F. 2d 672, 673 (C.A.D.C.); *Jones* v. *United States,* 131 F. 2d 539, 541 (C.A. 10); *Levine* v. *United States,* 138 F. 2d 627, 629 (C.A. 2); *United States* v. *Heitner,* 149 F. 2d 105, 107 (C.A. 2); *People* v. *Martin,* 46 Cal. 2d 106, 108; *People* v. *Maddox,* 46 Cal. 2d 301, 303; *Allen* v. *McCoy,* 135 Cal. App. 500, 507; *People* v. *Dewson,* 150 Cal. App. 2d 119, 129; 2 Wigmore, *Evidence* (3d ed., 1940), sec. 276. As stated in *Green* v. *United States,* 259 F. 2d 180, 182 (C.A.D.C.), certiorari denied, 359 U.S. 917:

> The appellant, then, made his own decision [of flight], not because of threatened assault, for he proved none. His effort to escape impelled his attempted illegal course * * * before the very eyes of the officers. The arrest was proper.

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front door and "as he started toward his living quarters" the agents, about seven in number, "broke in and pursued him * * *." This was only one of three versions Toy told, another being, "as I tried to close the door," the agent forced the door (R. 38), and the third being that he heard the crash when he "had gone back to [his] bedroom" (R. 47).

Or, as stated in *People* v. *Howard*, 173 Cal. App. 2d 787, 791, where the information had come from theretofore unknown members of a check-passing group:

> [T]he act of the man in slamming and locking the door indicated that the man was fleeing from and attempting to prevent the officer from apprehending him. The information which the officer had received and the conduct of the appellant in the presence of the officer constituted probable cause to arrest appellant. * * *

And see *Henry* v. *United States*, 361 U.S. 98, 103, distinguishing its facts from a case of "fleeing men or men acting furtively".[13]

The composite of elements here is as persuasive of guilt, we believe, as the circumstances in numerous decisions that have established probable cause upon corroboration of prior information by factors less

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[13] *Miller* v. *United States*, 357 U.S. 301, cited by petitioners to the effect that slamming a door and running did not justify entry (Pet. Br. 9), is inapposite, upon the facts stated in *Miller*—there, this Court questioned whether the running was from police, since it was doubted whether the concededly low-voiced enunciation of the word "police" had been heard. There was not, as here, an exhibiting of the official badge, and the officers were not in such uniform as would dispense with the need to show a badge (357 U.S. at 311). *United States* v. *Castle*, 138 F. Supp. 436 (D.D.C.), also cited by petitioners (Pet. Br. 9), did not involve flight. *Gascon* v. *Superior Court*, 169 Cal. App. 2d 356, did not embody prior events, as here, to give significance to the flight. *Badillo* v. *Superior Court*, 46 Cal. 2d 269, similarly lacked a background of prior events, as the prosecution there was still relying on the California non-exclusionary rule as to evidence (see pp. 272-273). *People* v. *O'Neill*, 10 Cal. Rptr. 114 (Dist. Ct. of App., Cal.), involved an admission by the officer that he had no information as to the reliability of his informant (p. 116), and the circumstances provided a possible innocent basis for the closing of the door.

persuasive than flight. In some cases, greater or less strength was to be found in the source of the information, and in others greater or less strength was to be found in the observations of the officers. In all the cases, of course, alternative innocent explanations of what was observed could have been hypothesized, *e.g.*, the surreptitious handing over of an envelope could, of course, be innocent. But the mere possibility of an innocent explanation for what was observed is not the test of probable cause; innocence can be conjectured or devised for virtually any act or movement. The test is a prudent evaluation of the totality of elements. See *supra*, pp. 20–23. We submit that the combination of circumstances here adds up to sufficient probable cause for arrest. See, *e.g.*, *Draper* v. *United States*, 358 U.S. 307; *Agnello* v. *United States*, 269 U.S. 20, 28, 31; *Rodgers* v. *United States*, 267 F. 2d 79 (C.A. 9); *Christenson* v. *United States*, 259 F. 2d 192 (C.A. D.C.); *United States* v. *Garnes*, 258 F. 2d 530 (C.A. 2); *Shepherd* v. *United States*, 244 F. 2d 750 (C.A. D.C.), reversed on other grounds *sub nom. Miller* v. *United States*, 357 U.S. 301; *United States* v. *Naples*, 192 F. Supp. 23 (D. D.C.), pending on appeal, C.A. D.C., No. 16436.

3. *The arrest of Toy was not rendered unlawful by the absence of affirmative evidence that the officers stated his purpose to arrest him.*

Petitioners contend (Pet. Br. 9) that the absence of affirmative evidence that the officer stated his purpose to arrest Toy brought the case within the prohibition of *Miller* v. *United States*, 357 U.S. 301.

The language of the *Miller* opinion itself answers this contention. This Court there noted decisions "holding that justification for noncompliance [with the requirement of statement of purpose] exists in exigent circumstances, as, for example, when the officers may in good faith believe * * * that the person to be arrested is fleeing or attempting to destroy evidence. *People* v. *Maddox*, 46 Cal. 2d 301, 294 P. 2d 6." The Court then stated that whether the rule admits of such exception "is not a question we are called upon to decide in this case" (*id.*, 309), and continued (357 U.S. at 310), "It may be that, without an express announcement of purpose, the facts known to officers would justify them in being virtually certain that the petitioner already knows their purpose so that an announcement would be a useless gesture. Cf. *People* v. *Martin*, 45 Cal. 2d 755, 290 P. 2d 855; Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 798, 802 (1924)."

The facts in *Miller* were very different from those in this case. In *Miller*, the police were not in uniform and the Court questioned whether the concededly low-voiced enunciation of the word "police" had been heard (357 U.S. at 311). Here, the officer showed his badge and stated, "I am a federal narcotics agent", before Toy slammed the door and ran (*supra*, pp. 24, 29–30). In *Miller*, 357 U.S. at 311:

> [Miller's] reaction upon opening the door could only have created doubt in the officers' minds that he knew they were police intent on arresting him. * * * [A]gent Wilson testified that "he wanted to know what we were doing

> there." This query, which went unanswered, is on its face inconsistent with knowledge. * * *

Here, there was no such query by Toy—he slammed the door and ran as soon as he knew he was confronted by a narcotic agent, without giving the agent an attempt to explain his purpose.

This case is governed, not by *Miller*, but by the authorities referred to in *Miller* as the basis for a possible exception. The forcing of entry here was necessary and lawful. In *People* v. *Maddox*, 46 Cal. 2d 301, referred to in *Miller* (*supra*, p. 34), the court said (p. 306):

> [S]ince the demand and explanation requirements of section 844 are a codification of the common law, they may reasonably be interpreted as limited by the common law rules that compliance is not required if the officer's peril would have been increased or *the arrest frustrated* had he demanded entrance and stated his purpose. (*Read* v. *Case*, 4 Conn. 166, 170 [10 Am. Dec. 110]; see Rest., Torts, § 206, com. d.). Without the benefit of hindsight and ordinarily on the spur of the moment, the officer must decide these questions in the first instance. When, as in this case, he has reasonable grounds to believe a felony is being committed and hears retreating footsteps, the conclusion that * * * the felon would escape if he demanded entrance and explained his purpose, is not unreasonable. * * * [Emphasis added.]

It was not until Toy's flight that the officer undertook to arrest Toy, and Toy's flight prevented the officer's advising him in specific words that he was to be ar-

rested. The officer was acting lawfully in pursuing Toy in order that the arrest would not be frustrated.[14]

C. PROBABLE CAUSE FOR THE ARREST OF PETITIONER WONG SUN WAS FURNISHED BY THE COMBINED, CONSISTENT STATEMENTS OF YEE AND PETITIONER TOY

1. Petitioners suggest (Pet. Supp. Br. 14) that the arrest of Wong Sun was unlawful because the officers relied upon narcotics obtained from and statements made by Yee at the time of Yee's arrest, claiming that the arrest of Yee was itself unlawful. The point has no merit.

No question was raised at the trial as to the lawfulness of the arrest of Yee *per se* and it is too late to raise one now. Nor is there any question as to the way in which the officers obtained the narcotics from Yee. Petitioners' suggestion that the agent's testimony that Yee "surrendered" the narcotics is "conclusionary" (Supp. Br. 14) is refuted by the record. On cross-examination, Agent Nickoloff was asked, "And you made a search of his premises, Johnny Yee's home or premises?". The officer replied, "No, I didn't actually make a search. He surrendered the nar-

[14] Toy testified that the officer pursuing him into the rear of the laundry ran across the bed in which Toy's wife and child were sleeping. Presumably this was intended to suggest misconduct in the manner of making the arrest, although the point was not articulated in argument. The officer testified that Toy had himself run across the bed to a nightstand into which he reached, and the officer, fearing a gun in the drawer, followed, drew his own gun, and handcuffed Toy. Petitioners offered the testimony of Toy's wife only "as to the condition of the door before and after the entry" (R. 48), and attempted no further development of the suggested misconduct beyond this tangential reflection on the officers.

cotics" (R. 66). This shows that the officer was distinguishing between a search and voluntary delivery. There is accordingly no basis in this record for a challenge to the arrest of Yee or the receipt of the narcotics.

Moreover, Yee's designation of Wong Sun as one of the suppliers of narcotics (the other being Toy) was not made at the time the officers were in Yee's home, but later, in the office of the Bureau of Narcotics. As we discuss generally *infra*, this voluntary statement, made after a period for reflection, represents an intervening independent act of volition which would not be tainted even if Yee's arrest were illegal. Yee's statement was accordingly a factor on which the officers could properly rely as one of the circumstances giving them probable cause to arrest Wong Sun.

2. It is without significance that the record does not show any prior acquaintance of the officers with Yee. His accusation of "Sea Dog" and Toy as the suppliers of the narcotics was significantly corroborated before the officers arrested Wong Sun on the morning of June 4. First, of course, Yee was not speaking without corroboration—his statement that he had been furnished heroin was substantiated by his actual possession. His statement that Toy had been one of the two who furhished the heroin was substantiated by Toy's similarly detailed knowledge of Yee's possession of the narcotics, as revealed in Toy's earlier statement to the officers. Yee's tie-in of "Sea

Dog" with Toy dove-tailed immediately thereafter with Toy's knowledge of the real name of "Sea Dog" (Wong Sun) and Toy's knowledge of where the latter lived. Further, the federal narcotics agent's familiar greeting to Wong Sun's wife by first name, before arresting him (*supra*, p. 6), warrants the inference that Wong Sun, who had a prior conviction for a narcotics offense, was known to the officer. The likelihood of recidivism in narcotics offenses is strong *Rodgers* v. *United States*, 267 F. 2d 79, 87 (C.A. 9); *Reyes* v. *United States*, 258 F. 2d 774, 785 (C.A. 9). This element was, at the least, a further factor properly to be taken into account in the judgment of the officers that Wong Sun was probably guilty of a narcotics offense, as asserted by Yee earlier that morning.

In short, both Toy and Wong Sun were arrested upon reasonable grounds for belief by the officers that the two had committed a narcotics offense. If the arrests were lawful, the judgment of the court of appeals below can properly be sustained upon that basis, without more. However, since the court of appeals upheld the convictions on the ground that they rested, not upon evidence seized in the arrests, but upon the actual finding of the heroin in Yee's house, and the voluntary statements and confessions of petitioners and Yee, we proceed now to discuss the validity of the judgment below upon that basis.

II

ASSUMING THAT THE ARRESTS WERE ILLEGAL, THE EVIDENCE UPON WHICH PETITIONERS WERE FOUND GUILTY WAS ADMISSIBLE BECAUSE IT WAS THE PRODUCT OF INTERVENING VOLUNTARY ACTS ON THE PART OF PETITIONERS AND A THIRD PARTY

On the assumption that the arrests were illegal, petitioners contend that all the evidence obtained after those arrests must be deemed the "fruit of the poisonous tree" and therefore inadmissible. The court below rejected this contention, holding that the voluntary statements by petitioners—by Toy at the time of his arrest and by both, later, after arraignment—were sufficiently independent so that they could not be said to be the product of the arrests. If this question need be reached, we submit that the decision of the court of appeals is correct.

There can be no doubt that if evidence sought to be introduced is the true product of illegal government action it is not admissible in a federal prosecution. The Court, however, has never held nor said that any evidence which would not have been obtained but for the illegal conduct is automatically inadmissible. Rather, the test has been the proximity of the connection between the improper official activity and the particular evidence proffered by the government. Where the bond is direct and unbroken the rule of exclusion applies, but where the connection is attenuated or the nexus is cut by sufficient intervening conduct the evidence is acceptable. In our view, a voluntary decision by defendants (or third parties)

freely to give information to arresting officers, when in truth it is freely given, breaks the link; the resulting evidence is not then attributable to, or the product of, the illegal arrests. Such freely-given declarations are the product of a human being's voluntary choice to speak rather than to remain silent when he could freely decline to say anything.

1. The general rule is illustrated by *Silverthorne* v. *United States*, 251 U.S. 385, which laid down the "poisonous tree" doctrine. There, the government seized evidence, made photostats, and studied the documents. After the documents had been ordered returned as illegally seized, the government attempted by subpoena to have the evidence produced for use at a trial. In reversing a conviction for contempt for failure to honor the subpoena, this Court pointed out that knowledge of the existence and contents of the documents was the direct result of the government's wrongful action and held that the government could not thus profit from its own wrong. Suppression of evidence would have little meaning, the Court said, if such a direct product of illegal action could be introduced in evidence. Similarly, where officers, as the result of an illegal entry, observe incriminating facts, testimony as to their observations is the direct product of the illegal entry and is excludable. *E.g.*, *McGinnis* v. *United States*, 227 F. 2d 598 (C.A. 1) (cited by petitioners). There is obviously a direct connection between the illegal entry and the officers' observations.

This Court also applied the "poisonous tree" doctrine in *Nardone* v. *United States*, 308 U.S. 338, holding that evidence would be inadmissible, not only if obtained directly from illegal wire-tapping, but also if obtained from leads or clues stemming from the wire-tapping. The Court indicated, however, that the connection between the illegal official conduct and the evidence must be direct and adequate. The opinion carefully pointed out, with respect to the relationship between the officers' misconduct and the government's proof (308 U.S. at 341):

> As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. * * * [15]

2. On the other hand, the Court has recognized that, even though illegal action by government officers has in some degree contributed to the obtaining of evidence ultimately used, nevertheless, if that evidence represents primarily an act of human free will, the evidence is admissible. In *United States* v. *Bayer*, 331 U.S. 532, 540–541, the Court held admissible a confession voluntarily given, without regard to

[15] An example of attenuation, even without an intervening act of free will on the part of the defendant, is furnished by *Goldman* v. *United States*, 316 U.S. 129, 134–135, where an earlier trespass in an office to install a listening device resulted in failure of the device. The Court rejected the contention that a later installation, involving no trespass, was tainted by the earlier conduct, even though it was contended that the trespass, and what was learned thereby, was of assistance in placing the second installation. The Court relied upon the findings that the trespass did not aid "materially" in the use of the second device.

whether a confession six months earlier had been lawfully or unlawfully obtained. The Court said:

> Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed. The *Silverthorne* and *Nardone* cases, relied on by the Court of Appeals, did not deal with confessions but with evidence of a quite different category and do not control this question. * * *

We believe that it is the concept of an intervening independent act of a free will—the defendant, as a human being, can choose to speak or to remain silent—which furnishes the rationale for the rule (which pertains generally in state and federal courts) that a statement or confession voluntarily made during detention, without compulsion and without undue delay in arraignment, is not rendered inadmissible by the illegality of the original arrest. *Smith* v. *United States*, 254 F. 2d 751, 758–759 (C.A. D.C.), certiorari denied, 357 U.S. 937; *United States* v. *Walker*, 197 F. 2d 287, 289–290 (C.A. 2), certiorari denied, 344 U.S. 877; *Gibson* v. *United States*, 149 F.

2d 381, 384 (C.A. D.C.), certiorari denied *sub nom. O'Kelley* v. *United States*, 326 U.S. 724.[16]

3. Where, at the time and place of an illegal arrest or an illegal search, a defendant makes statements which are themselves evidence or which lead to other evidence, the situation lies between those we have just discussed. On the one side, the illegal official action is still occurring and its effects may, to a greater or less degree, still be operative. On the other, the statements, if not coerced, do represent an independent intervening act of free will on the part of the defendant. As Judge (later Chief Justice) Vinson said in *Nueslein* v. *District of Columbia*, 115 F. 2d 690, 692 (C.A. D.C.), there "exists the heaviest cross-fire between the legal significance of voluntary declarations, and a completely unlawful entry into a home.' It is not always easy to decide whether the statements are truly the product of the illegal government action or result from an intervening independent act of volition. But it seems clear to us that there should be no general rule barring all statements or admissions made in connection with or after an illegal arrest. For instance, if an individual arrested without probable cause while walking on a busy street blurts out at once in remorse—before the officer says anything more than "I arrest you"—that he is guilty of stealing certain goods and will make restitution, it would seem unwise to bar that volun-

[16] The state, as well as the federal, cases are collected in Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure*, University of Illinois Law Forum (1961) 78, 81, fn. 16.

teered confession or the evidence of larceny obtained as a result of the confession. Human beings do normally have power to control their own speech, and, when they do choose to speak, their words, if voluntary, cannot be simply equated, without more, to intangible objects observed or discovered in the course of an illegal arrest or search.

To us, what the existing decisions [17] show is that the question whether a statement made at the time of an illegal entry or illegal arrest should or should not be deemed admissible cannot be settled by any fixed rule but must essentially represent a judgment, based on all the circumstances, as to whether the illegal government action or the voluntary act of the defendant is the primary motivating force behind the production or discovery of the evidence. The leading case holding that voluntary admissions at the time of an invalid search are admissible is *Quan* v. *State*, 185 Miss. 513.[18]

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[17] For a list of cases, see *Nueslein* v. *District of Columbia*, 115 F. 690, 691–692 (fns. 2 and 3). Other cases are noted in Kamisar, *op. cit. supra*, at page 83, fn. 22.

[18] The court, after pointing out that an illegal search resulted in barring from evidence all knowledge acquired by officers through their senses during the course of the search, any statements heard when the speakers were unaware of the presence of the officers, and any statements made under circumstances rendering them involuntary, went on to say (185 Miss. at p. 520):

> But there there is no such an essential connection between an illegal search —wherein the illegality consists solely in the want of a valid search warrant—and statements freely and voluntarily made to the officers during the course of that search as to bar such free and voluntary statements. Even though a search is being made, and although it be illegal because of the invalidity of the search

Yet, under other circumstances, where a confession that there was whiskey in a suitcase came as the result of an officer's illegally taking the suitcase from a moving train, the Mississippi court held that the *Quan* rule did not apply and that the admission should not have been allowed in evidence. In the latter case the illegal seizure left the defendant no choice to give or withhold the information; the officer had already seized it. *Harris* v. *State*, 209 Miss. 183. The California courts, since adopting the rule of exclusion, have held inadmissible admissions made under the actual compulsion of an illegal search or arrest. *People* v. *Dixon*, 46 Cal. 2d 456 (1956); *People* v. *Macias*, 180 Cal. App. 2d 193 (1960). Yet California has held that this rule does not apply to an attempt at bribery made when a person was illegally arrested. *People* v. *Guillory*, 178 Cal. App. 2d 854. Thus, even California, which has applied stringent rules in this field, does not hold inadmissible *any* statement by the defendant which would not have been made but for the unlawful arrest; where the statement is the deliberate and voluntary act of the defendant, California has permitted it to be used.

4. Where a defendant makes statements directly related to things unlawfully seized, the unlawful seizure may well be considered the primary force behind

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warrant, the party whose premises are being searched may remain wholly silent, if he chose so to do. And, on the other hand, any responsible and competent person is at liberty to speak as against himself or against his own interests at any time or place or under any and all circumstances, so long as he freely and voluntarily does so.

the statement—nothing else appearing. As the Ninth Circuit phrased it in *Takahashi* v. *United States*, 143 F. 2d 118, 122, "all declarations and statements under the compulsion of the things so seized, are affected by the vice of primary illegality." Cf. however, *Quan* v. *State*, discussed *supra*; *Rohlfing* v. *State*, 230 Ind. 236. The situation is quite different where as here (in the case of petitioners) nothing is found and the defendant thus has nothing to explain away.

The decision in *Nueslein* v. *District of Columbia*, 115 F. 2d 690 (C.A.D.C.), held that, even though nothing was found after an illegal entry, statements made during the illegal entry were the result of an illegality and therefore inadmissible. Officers, investigating a misdemeanor (an accident in which a taxicab struck a parked car), went to the home of the taxicab owner and entered the home without a warrant and without permission of the owner. The owner admitted that he had been driving the taxi and, since he appeared to the officers to be drunk, the officers placed him under arrest. In holding excludable the admission by the defendant that he was driving the taxicab at the time of the accident, the court of appeals, noting that only a misdemeanor was involved, stressed the desirability of vindicating the right to privacy of a home and ruled that the effective way of protecting that right was "to dissolve the evidence that the officers obtained after entering and remaining illegally in the defendant's home." 115 F. 2d at p. 695. This decision goes far in connecting the admissions with the illegality since the illegal entry in no sense compelled the owner to talk. Even so, that decision does not go as

far as would be necessary in this case to hold inadmissible and unusable the statement made by petitioner Toy. In *Nueslein* the admissions made by the taxicab owner were admissions of guilt as to the very act which prompted the officers to make the illegal entry; they were also made while the man appeared to be intoxicated, not in full possession of his faculties. Here, petitioner Toy, although knowing that the officers had found no narcotics in his house or on his person, deliberately sent them to Johnny Yee in order to divert suspicion from himself. Toy saw an opportunity to sidetrack the officers, and consciously chose to do so.

For this reason, we think the statements in this case are a significant step removed from the *Nueslein* case and that that step is sufficient for the ruling here to fall on the side of admissibility. The motivating force behind Toy's statement that he knew Yee had narcotics was Toy's own voluntary act of deciding to give that information. Nothing in the entry by officers, nothing the officers found, would have sent them to Yee. The information communicated by the officers to Toy that Hom Way had named Toy as a source of narcotics in no way stemmed from the illegal entry. And it was Hom Way's information which caused Toy to send the officers to Yee. It later turned out that Toy's scheme to divert the agents failed, but at the time he evidently hoped to clear himself. This led to his voluntarily choosing to speak—and his words became the trail to new evidence. In short, petitioner Toy would now

have the courts bar evidence that he himself deliberately uncovered.

The present situation is much closer to the bribery case which was before the California court in *People* v. *Guillory*, 178 Cal. App. 2d 854, *supra*, than it is to *Nuesleiv*. There, the defendant claimed that the offer of the bribe would not have been made except for the illegal arrest. The court noted that nothing in the arrest compelled the bribe and held that the illegal entry and arrest had nothing to do with the bribery "except as they furnished the setting for it." So here, the illegal entry may have furnished the setting for informing Toy of Hom Way's accusation, but the entry did not cause Toy to send the officers to Yee.

The factual pattern here is also analogous to that before the Second Circuit on the issue of consent in *Burgos* v. *United States*, 269 F. 2d 763, 766 (C.A. 2), certiorari denied, 362 U.S. 942. In *Burgos*, after a defendant had been arrested for illegal entry into the country as an alien, he was asked about narcotics and handed over a small glassine envelope saying that it was for his own use. Subsequently a search disclosed a large quantity of narcotics. Despite the fact that, as petitioner argues, the courts have generally, particularly in recent years, tended to find that consent to a search at the time of arrest is not voluntary,[19] the district court and the court of appeals found that Burgos had voluntarily turned over the glassine envelope. The court of appeals pointed out that he was

[19] See *United States* v. *Arrington*, 215 F. 2d 630 (C.A. 7); *Catalanotte* v. *United States*, 208 F. 2d 264 (C.A. 6); *Judd* v. *United States*, 190 F. 2d 649, 651 (C.A.D.C.).

trying to use the glassine envelope as a cover-up, and that, instead of characterizing his behavior as an admission, it was far more plausible to interpret it as an attempt to ingratiate so as to convince the agents that he was only a "small time user" and might well be released in exchange for a bribe. So here, petitioner Toy tried to divert the agents by sending them to Yee. The propelling force behind the discovery of the narcotics at Yee's house was Toy's own act in sending the agents to Yee. Since it was Toy's deliberate and voluntary act which caused the officers to go to see Yee, the evidence recovered from Yee should be deemed to be Toy's independent responsibility, not the product of illegal government action in entering Toy's house.

5. Petitioners seek to invalidate not only Toy's statement at the laundry, but Yee's voluntary delivery of the narcotics and his unanticipated and independent statement in which he implicated Toy as well as Wong Sun, and even the later, disconnected, full confessions of Toy and Wong Sun, made after an interval of 5 days (after arraignment).

As pointed out *supra* (pp. 36–37), nothing with respect to Yee's surrender of the narcotics or accusation of Wong Sun and Toy involved any unlawful conduct of the officers. No search was made, and Yee's designation of Wong Sun and Toy as the persons who brought the narcotics to Yee's house was voluntarily made at a later time. He did not make this accusation on the spur of the moment when he delivered the narcotics to the officers at his house, but subsequently at the office of the Bureau of Narcotics,

when there had been an interval of time in which to consider whether to disclose his suppliers—an interval of time in which to make an independent voluntary determination as to cooperation or non-cooperation with the officers.

As for the full confessions of the petitioners, which were wholly voluntary and made after arraignment, they were clearly admissible under the well settled rule, noted *supra* (pp. 41–43), that a later voluntary confession is admissible even if the arrest was illegal.

III

PETITIONERS' CONFESSIONS WERE CORROBORATED BY SUBSTANTIAL ADDITIONAL EVIDENCE

Petitioners' confessions, as we will point out in detail below, showed that they transported heroin on or about June 1. The independent testimony of the officers showed the delivery of 27 grams of heroin to them by Yee at Yee's house, and showed petitioner Toy's detailed familiarity with the location of Yee's room in the house and even the usual time for the departure of Yee's mother from the house (R. 63–64). In addition, Yee—in other respects a recalcitrant witness—confirmed his acquaintance with both petitioners Wong Sun and Toy (R. 20). He also testified to an earlier, corroborating statement to the officers, made under oath, that Wong Sun and Toy had come to his house on June 1, prior to midnight, and on June 3, between 11 p. m. and midnight, but he alleged at the trial that his earlier statement had been false (R. 29–30). Taken together, these items of

evidence outside the confessions furnished adequate corroboration.

A. CORROBORATION OF A CONFESSION REQUIRES ONLY EVIDENCE THAT WILL TEND TO ESTABLISH THE TRUSTWORTHINESS OF THE CONFESSION, AND DOES NOT REQUIRE EVIDENCE SUFFICIENT TO ESTABLISH THE CORPUS DELICTI INDEPENDENTLY OF THE CONFESSION

The special problem with respect to reliance on a confession arises out of concern whether a particular confession may be the product of "the aberration or weakness of the accused under the strain of suspicion" (*Opper* v. *United States*, 348 U.S. 84, 90). But if facts are shown, by evidence other than the confession, demonstrating that the confession is not a fantasy warped by the aberration or weakness of the accused, then the finder of fact—here, the trial judge—may properly attribute the confession to the familiar motivation of an accused person who realizes that he has been caught and may as well tell the truth. The confession may then be weighed upon the basis "that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement" (*Hopt* v. *Utah*, 110 U.S. 574, 585).

The limited extent of the corroboration required has been clearly marked by this Court. The essence, as stated in *Opper, supra*, is that the independent evidence should "tend" to establish the trustworthiness "of the statement"; and it "is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth" (348 U.S. at 93).

It is equally clear that "the corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delicti" (*Opper* v. *United States*, 348 U.S. 84, 93) or, as elaborated in *Smith* v. *United States*, 348 U.S. 147, 156 (emphasis added):

> It is agreed that the corroborative evidence does not have to prove the offense beyond a reasonable doubt, or even by a preponderance, as long as there is substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that defendant is guilty. [citing decisions]. In addition to differing views on the substantiality of specific independent evidence, the debate has centered largely about two questions: (1) whether corroboration is necessary for all elements of the offense established by admissions alone [comparing decisions], and (2) whether it is sufficient if the corroboration merely fortifies the truth of the confession, without independently establishing the crime charged. [comparing decisions]. We answer both in the affirmative. All elements of the offense must be established by independent evidence *or* corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense "through" the statements of the accused. * * *

While it is concededly difficult to match the facts of the various cases in which this type of question arises, the independent testimony here is at least as corroborative as that held sufficient in other cases

where the independent evidence was admittedly insufficient to prove the whole case in itself but was found to be enough to indicate that the various admissions were reliable. Thus, in *Smith* v. *United States*, 348 U.S. 147, quoted above, an admission that the taxpayer had small net worth at the commencement of an income-tax prosecution period was held sufficiently corroborated by such nondispositive but supporting facts as recitals of low income in tax returns prior to the net worth date. The recitals in earlier returns might well have been falsified but they nevertheless were consistent with the statement of a low net worth. Similarly, the employment of the taxpayer at low pay prior to the net worth date was corroborative of low net worth, although the low pay would not preclude substantial assets held from a long time before, which might have negated a low net worth. Corroboration was also found in the taxpayer's conduct during the prosecution period, in the form of large expenditures and a new racing-news business in which he kept no records (*id.*, 157–159).

In *Opper* v. *United States*, *supra*, 348 U.S. 84, the accused's admission that he paid the money to a government official (although in the admission it was asserted that this was only a loan) was held corroborated by a check drawn by the defendant, together with the records of a concurrent long-distance call to Opper's home from the employee's home, and an airline ticket in the employee's name to Opper's city. There, again, any or all of the cor-

roboration *could* have been explained away upon various hypotheses, but the facts did serve to indicate that the admission by the accused was no mere fantasy or aberration.[20]

We turn now to the corroboration of the confessions in the present case.

B. WONG SUN'S CONFESSION AND ITS CORROBORATION

1. Wong Sun's confession stated the following: He met petitioner Toy at Marysville, California, about the middle of March, 1959, during a Chinese celebration. They returned to San Francisco together and discussed the possible sale of heroin. Wong Sun informed Toy that he could get a "piece" (28 grams, *supra*, p. 7) from one "Bill" for $450. Shortly after, Toy told Wong Sun he wanted a piece for "Johnny". Wong Sun knew Johnny only through Toy. Wong Sun obtained the heroin, and did so again on about 7 or 8 additional occasions, on one of which the heroin was for someone other than Johnny. On several occasions after obtaining the first piece, Wong Sun drove with Toy to Johnny's house, 606—11th Avenue (in San Francisco), and Toy would deliver the heroin to Johnny and the three would smoke some of the

[20] In *United States* v. *Carminati*, 247 F. 2d 640 (C.A. 2), certiorari denied, 355 U.S. 883, the admission of a defendant in October 1956 to one Botto that he had supplied one Russano with heroin was held sufficiently corroborated by a statement of Russano to Botto a year before, in September or October 1955, that the defendant was his supplier. There was also a discovery of Banker's Trust Company envelopes, in the defendant's possession, of the type used in the particular narcotics conspiracy (*Id.*, 642, 644).

heroin. Johnny paid Toy $100 for each piece. On three other occasions Wong Sun and Toy went to Johnny's without bringing heroin, and smoked heroin there and obtained some for themselves.

"About" four days before the arrest—*i.e.*, on May 31, with post-midnight events occurring on June 1—Toy gave Wong Sun $450 and, after the latter obtained the heroin, Toy phoned Johnny, and Toy and Wong Sun drove to Johnny's house at about midnight and Toy gave the heroin to Johnny in a rubber contraceptive enclosed in a small brown bag.

On the night before the arrest, before 11 p.m., Toy phoned Johnny, and the two went to Johnny's to smoke heroin for half an hour. They also obtained one "paper" for their own use later.

2. Upon the basis of further substantial evidence at the trial, both the trial judge, as trier of the fact, and the court of appeals below were clearly entitled to conclude that this confession was no mere fantasy or aberration and was properly to be weighed as evidence. The critical portion of the confession—the statement that Wong Sun transported an ounce of heroin from his source of supply to Toy on the night of May 31, 1959, and that he and Toy then transported the heroin to Yee at Yee's house at about midnight—is firmly substantiated by the discovery of 27 grams of heroin at Yee's house on the morning of June 4. That possession was attested in the separate testimony of Agent Nickoloff and by actual production of the heroin in court. No effort was made by petitioners at the trial to ascribe the heroin to any other source.

The absence of a part of the ounce, and the division of the heroin into several containers after being brought to Yee's house in one container, substantiate the further portion of Wong Sun's confession that he and Toy had gone to Yee's house again on the night of June 3 and smoked heroin and taken one "paper" for their later use. If the entire ounce had remained in Yee's hands when the officers arrived, there would have been a question as to the source of the heroin smoked and taken by Wong Sun and Toy on the night of June 3. With the elimination of a gram, Wong Sun's confession remains consistent with the evidence delivered to the officers.

The statement in Wong Sun's confession placing Toy at Yee's house on the night of June 3, was further substantiated in Agent Nickoloff's testimony that Toy had admitted to him on June 4 that he had been at Yee's house the night before.

In addition, the separate testimony of Yee, despite his obvious hostility to the government, substantiated other facts stated in Wong Sun's confession. Yee admitted that he knew Wong Sun and he identified him in the courtroom. Consistently with Wong Sun's statements as to the recency and limited nature of his acquaintance with Yee, Yee testified that he had known Wong Sun "just this year", under the nickname "Sea Dog", and did not know whether Wong Sun was a sailor or how the nickname originated. This compared accurately, as is discussed below, with Yee's testimony concerning a longer and closer acquaintance with Toy.

The trial court was not required to give credence to Yee's testimony that Wong Sun had not been at his house, for this testimony was impeached by Yee's own admission on the stand that he had given a contrary statement on June 9, under oath, that Wong Sun and Toy had come to his house on the night of June 1 and again on the night of June 3—the nights specified in Wong Sun's confession.[2]

In sum, the 27 grams of heroin surrendered by Yee at Yee's house on June 4 itself attested that narcotics had been transported to the house—narcotics that cannot be legally imported and for the manufacture of which no opium can be legally imported. Wong Sun's confession, shown to be reliable by several aspects of evidence *aliunde*, stated that the heroin had been brought by him and Toy. Moreover, in transporting the heroin, Wong Sun was necessarily

[2] While certain remaining evidence *aliunde* the confession was introduced only on *voir dire* it may be noted here for the limited purpose of demonstrating that the district judge, as trier of the fact, was not on notice, from his additional hearing of the *voir dire* testimony, of anything impugning the trustworthiness of the confession. To the contrary, the *voir dire* testimony afforded persuasive corroboration of Wong Sun's confession. Agent Nickoloff testified that Yee, on the morning of his arrest on June 4, had named Sea Dog (Wong Sun) and Toy as the persons who had brought "the narcotics which Johnny Yee surrendered" to Yee's home approximately on the first of June (R. 90). Moreover, Toy further attested the degree of his acquaintance with Wong Sun by leading the officers to Wong Sun's home (R. 90). As to the portion of Wong Sun's confession asserting his ability to obtain heroin, the explanation appears in his prior experience—he stipulated, at the trial, that he had already been once convicted of a narcotics offense. (R. 89).

in possession of the heroin for a substantial interval of time sufficient to bring into effect the statutory presumption of guilty knowledge derived from possession. Petitioner's reliance (Pet. Br. 28) on *United States* v. *Landry*, 257 F. 2d 425 (C.A. 7), is misplaced. Landry's admission was rejected, not for lack of corroboration, but for its failure to prove what it sought to prove, *i.e.*, possession (*id.*, 431). The government there adduced an admission by the defendant that he *owned* the narcotics that were found in the possession of another person (*id.*, pp. 430–431). But the statute required possession rather than ownership in order to raise a prima facie presumption of a violation. Here that issue is not present—Wong Sun's confession admitted transportation of the heroin from Bill to Toy and to Yee and *a fortiori* the confession admitted the possession intrinsic in such transportation.

Every necessary element of Wong Sun's offense was thus proved beyond a reasonable doubt by the procedure approved in *Smith* v. *United States*, 348 U.S. 147, 156 (*supra*, p. 52)—"the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused".

C. TOY'S CONFESSION AND ITS CORROBORATION

Toy's confession, unlike that of Wong Sun, shows deliberate and ingenious effort on his part to withhold some of the facts. Like the accused in *Opper* v. *United States*, *supra*, 348 U.S. 84, Toy obviously sought to admit only what he thought could be proved

against him by other evidence. But the statements in his confession were sufficiently corroborated to warrant consideration of his confession as evidence. What he failed to realize was that the combination of what he admitted, together with what appeared in evidence *aliunde* and what was properly inferable from the totality of facts, was sufficient to prove such participation by him in a narcotics transaction as to establish his guilt beyond a reasonable doubt.

1. Toy's confession admitted the following: He first met Wong Sun, known to him as "Sea Dog", about three months before June 5, 1959, at Marysville, California, during a Chinese holiday. Toy drove him back to San Francisco. Sometime during April or May of 1959, Wong Sun asked Toy to drive him to the home of Johnny Yee, at 11th and Balboa Streets (in San Francisco), first asking Toy to phone Johnny that they were coming. Wong Sun there delivered to Johnny a paper package of heroin and, upon Toy's request, "they" gave him some which he smoked. Wong Sun paid Toy $15 for driving him to Johnny's house. Toy drove Wong Sun to Johnny's house "about 5 times altogether," each time receiving $10 or $15 and enough heroin for 3 or 4 cigarettes.

The confession indicates that the last time Toy drove Wong Sun to Yee's house was on June 2. The specific language is "last Tuesday, May 26, 1959", but "last Tuesday", whether viewed from June 5, a Friday, or June 9, a Tuesday (whichever was the date of the confession), could only have been June 2, according to the 1959 calendar. What apparently occurred when the statement was made was a too hasty

glance at the calendar for the date—the particular date could be confused, whereas "last Tuesday" was not likely to be confused with a Tuesday 10 or 14 days in the past. Moreover, the confession continues with immediate reference to "Wednesday night, June 3", when Toy phoned Johnny that he didn't "have anything" and was coming out "pretty soon". When he arrived, Johnny gave him—"just out of friendship"—a paper of heroin sufficient for 5 or 6 cigarettes, without any money given or asked. "He has given me heroin like this quite a few times. I don't remember how many times".

Toy had "known Hom Wei [the original informer] about 2 or 3 years but I have never dealt in narcotics with him. * * * The only connection I have now is Johnny Yee."

2. This confession was corroborated in numerous respects by substantial evidence. As in the case of Wong Sun's confession, when Toy spoke of delivery of heroin at Yee's house he was not spinning a fantasy—the testimony of Agent Nickoloff that Yee had 27 grams of heroin at his house on the morning of June 4, and the presentation of the heroin in court provided firm substantiation for this critical aspect of Toy's story. We recognize that the literal language of Toy's confession does not embody an outright statement that heroin was delivered on the particular Tuesday night. The statement is only that Toy drove Wong Sun to Yee's house on that night, but the phrasing, in its context as the account

of the last of a series of visits to Yee's house, shows that this was another instance of delivery of heroin. The statement is preceded by the sentence, "Each time [I have driven Wong Sun to Yee's] Wong Sun gave me $10 or $15 for doing it and also, he gave me a little heroin—enough to put in 3 or 4 cigarettes". Moreover, the confession is specific that, on the first of this series of well-paid trips to Yee's house, heroin was delivered to Yee. The clear effect is that heroin was delivered at Yee's house on Tuesday night, and the supporting evidence of the federal agent attests that there was heroin at Yee's house on Thursday morning.

Various other elements of the confession were corroborated. Toy admitted a series of visits to Yee's house. It was reasonable to conclude that this admission was true in the light of Toy's very detailed familiarity with the house—as disclosed in the testimony of Agent Nickoloff as to what was said when Toy sought, on June 4, to divert the officers to Yee as the seller of narcotics.

The statement in Toy's confession specifically placing him at Yee's house on the night of June 3 was further substantiated in Agent Nickoloff's testimony that Toy admitted to him on June 4 that he had been at Yee's house the night before. Toy also stated, in his confession, that Yee gave him heroin out of friendship. The aspect of friendship was supported in Yee's testimony at the trial. He said that he had known Toy since 1951 or 1952 and that Toy and

wife and children had been present at Yee's housewarming party (R. 20–21).[22]

Accordingly, the confession was properly considered by the trial judge as substantiated. Despite Toy's obvious effort to exculpate himself, his cleverness in this respect, as in the case of *Opper* v. *United States, supra*, 348 U.S. 84, fell short of success. For Toy in his admissions, while seeking to paint Wong Sun as the seller and transporter of the heroin to Yee's house, admitted accepting enough heroin on June 1 for 3 or 4 cigarettes, and a bindle of heroin on June 3 "enough for 5 or 6 cigarets", to say nothing of Toy's aiding and abetting of Wong Sun in the transportation. See 18 U.S.C. 2. Toy thus admitted possession of part of the heroin on June 1 and therefore was subject to the statutory presumption of guilty knowledge arising from possession of narcotics. The evidence of the amount of heroin at Yee's house on June 4 clearly corroborated Toy's admission of the availability of heroin for delivery to him at Yee's house on or about June 1.

The trial judge was not required to believe the entirety of either Toy's confession or that of Wong Sun. In *Opper* v. *United States, supra*, 348 U.S. 84,

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[22] It may be pointed out also, as with respect to Wong Sun's confession, that the district judge, as trier of the fact, was not presented with any facts in the *voir dire* testimony that would impugn the reliability of Toy's confession. To the contrary, on *voir dire*, the evidence confirmed Toy's acquaintance with Wong Sun—it was Toy who found Wong Sun's residence for the officers. And Yee confirmed, in his statement to the officers, the visit of Wong Sun and Toy to his house—it was Sea Dog "together with James Wah Toy" who had brought "the narcotics which Johnny Yee surrendered" (R. 90).

the admission of a payment to a government official was accepted as true but Opper's statement that this payment was only a loan was not required to be accepted. So, here, the trial judge could consistently find that, on or about June 1, Wong Sun had, at the least, transported heroin from his source "Bill", and that Toy had, at the least, possessed in Yee's house heroin, the transportation of which he had aided. This much of the confessions was sufficient proof of guilt, and (as we have pointed out) the confessions were adequately corroborated by the introduction in evidence of the 27 grams of heroin, and by the testimony of the officers and of Yee.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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